

INTERNATIONAL ADVANCED LEVEL

LAW

TOPIC GUIDE

Law and Morality

Paper 1: Underlying Principles of Law and the English Legal System

Pearson Edexcel International Advanced Level in Law (YLA1)

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R v Gilderdale (2010) unreported
[R v Human Fertilisation and Embryology Authority, ex parte Blood \(1997\) 2 All ER 687; \(1997\) 2 WLR 806; \(1999\) Fam 151](#)
[R v Inglis \(2011\) 1 WLR 1110](#)
[R v Quare & Others \(2005\) 1 WLR 3642](#)
[R v R \(1991\) UKHL 12](#)
[R v Wilson \(1996\) Crim LR 573](#)
[Re A \(conjoined twins\) \(2001\) 2 WLR 480](#)
[Re S \(1992\) 4: 671-672](#)
[Shaw v DPP \(1962\) AC 220](#)

Biographies and articles

[Bentham on Utilitarianism](#)
[Bentham's Utilitarianism: theory, Scope & Criticisms](#)
[Cicero](#)
[Émile Durkheim](#)
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[Thomas Aquinas](#)
[Thomas Aquinas' and Emanuel Kant's Moral Philosophy Essay](#)
[Utilitarianism: John Stuart Mill](#)

Books

Harris, Phil [An Introduction to Law, Fifth Edition](#) (Butterworths, 1997)
Martin, Jacqueline [English Legal System Eighth Edition](#) (Hodder, 2016)

Pearson Edexcel International Advanced Level in Law

Paper 1: Underlying Principles of Law and the English System

Introduction to the topic of Law and Morality

This topic booklet is designed to act as a template of good practice for all other topic areas on the Pearson Edexcel International A Level in Law specification for Paper 1: Underlying Principles of Law and the English Legal System.

This topic guide includes materials that will be helpful to use when covering Paper 1 content, where the sections listed below are the section numbers as listed in the specification.

1.1 – The nature, purpose of and liability in law

- 1.1.9 Distinction between laws and rules – Certainty
- 1.1.10 Distinction between laws and rules – Enforcement
- 1.1.11 Distinction between laws and rules – Sanctioned by the state
- 1.1.12 Theories of Law and Justice – Positivism
- 1.1.13 Theories of Law and Justice – Natural law
- 1.1.14 Theories of Law and Justice – Utilitarianism
- 1.1.15 The relationship between law and morality – the Hart-Devlin debate and Wolfenden Report
- 1.1.16 Public and private morality
- 1.1.17 Legal interpretation of morality

The topics covered are those that students often struggle with, both conceptually and also when applying to and answering legal questions.

The guide includes and refers to:

- notes, legislation, case law and explanation of the law that is commensurate with the specification requirements
- guidance on the technique required to successfully apply each area of the law to a problem
- detailed plans of how to structure and answer on each topic.

The topic on Law and Rules

1.1.1-1.1.3

Definitions and examples

Laws – a simple, introductory definition is:

- the rules of the state that govern our lives and apply to the whole country
- laws made by a recognised process are valid and enforceable, i.e. judicial precedent or parliament
- laws are certain and if not complied with, or if they are breached, will carry a penalty.

Definitions include:

- Austin – *'a command issued by a superior (the state) to an inferior (the individual) and enforced by sanctions' (but this definition does not include regulatory law).
- Salmond – ** 'the body of principles recognised and applied by the state in the administration of justice'. They are a set of rules and boundaries that are established by authorities which must be obeyed, otherwise a sanction may be given.
- Martin – 'a formal mechanism of social control'.

Rules:

- apply only to certain groups or in limited situations
- do not have the force of law
- societies/clubs may have their own sanctions, but these do not apply to society as a whole
- derive from custom or practice
- breaking a rule may lead to disapproval in society but not punishment.

Group discussion should then focus on examples of both laws and rules and student discussion should provide examples of the three distinguishing criteria emphasised in the specification – certainty, enforcement and sanctioned by the state.

Throughout the topic guide, there is mention and some coverage of many theorists, which may seem overwhelming to students. It may be useful to introduce these theorists in stages, so it is suggested that **John Austin** and **Sir John Salmond** are researched individually by students at this early stage.

Briefly, **John Austin** (1790–1859) - posthumously influenced law with his theory that all human-made ("positive") laws can be traced back to human lawmakers, and this is known as legal positivism. Also, with his definition of law above* and his belief that law and morality are separate.

Sir John Salmond (1862–1924)

His definition of law above ** is wider than Austin's, and more modern. It brings out the ethical purpose of law and links law and morality.

Salmond criticises Austin's theory of law because it lacks the moral or ethical elements on law. Salmond said that this theory is one-sided and inadequate and eliminates all elements except force. It missed the elements in law and the importance of justice.

It is said that the definition of Salmond is defective as it assumes that law is always the logical result of administering justice. However, if a statute is not law because it can be misinterpreted, it is also not law if a judicial decision can be overruled.

Sections 1.1.1-1.1.3 will normally lend themselves to short/part questions when this topic appears on Paper 1. Students should read the question carefully and be precise and concise in their answers, remembering that on ePEN the examiner only sees the response to that section of the question on the computer screen.

1.1.9 Theories of law – Positivism

Legal positivism – this theory is where people believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.

There is no ethical justification for the law.

The relevant theorists for students to research here are:

Austin (as above *). Liking laws does not matter as long as they are made using proper process – the liberal view of laws.

Hans Kelson (1881–1972) – an Austrian philosopher and Jurist. He believed in a pure theory of law and described law as a hierarchy of binding norms but did not evaluate those norms. This theory is based on a believing a norm is legally 'valid' if and only the organ creating it has been so empowered by a higher norm.

Professor H L A Hart (1907–1992) – an English philosopher.

Important for:

- The Concept of Law, in which he critiqued Austin's theory and distinguished primary and secondary legal rules.
- The famous debate with Patrick Devlin (see later) and his subsequent publication of Law, Liberty and Morality.
- Said, to be valid, laws have to be primary or secondary:

- primary – impose obligations (criminal law) or grant powers (contract law)
- secondary – primary must be made by parliament or judges
and
- must have a process for creation, amendment and revocation.

It is important to note that detailed life histories of the theorists in these sections are not necessary and emphasis should be on their beliefs and theories. Students should be able to analyse these and provide examples. Like the earlier specification sections in this topic guide, sections 1.1.9 – 1.1.11 lend themselves to short/part questions on the paper. Students should be able to analyse these beliefs and views, debate and provide examples (see suggestions in the Getting Started Guide).

1.1.10 Theories of law – Natural law

Natural law – this theory is where law is based on observing human nature and based on values intrinsic to human nature that can be applied independently of positive law. It states that all people have rights, given not by legislation but by ‘God, nature, or reason.’

The relevant theorists for students to research here are:

Thomas Aquinas (1225–1274) developed an ethical theory which was known as ‘natural law’. The purpose was to help people make moral decisions about issues they may face during their lives. He believed that there were laws set by God and that humans needed to follow these to underpin their decision-making throughout life. In order for laws to be valid, they must satisfy a set of higher moral values than man’s, e.g. divine law.

Lon Fuller (1902–1978) – an American philosopher.

Fuller criticised legal positivism and agreed with a secular and procedural form of natural law theory. He defined law as achieving social order by ‘subjecting human conduct to the governance of rules.’ He believed these rules and norms are built into our law and contain an ‘inner morality of law’ - eight principles of inner morality not linked to belief in God, e.g. published laws, possible to obey.

Activity:

Name one divine law that links to actual law and one divine law that does not.

Hart’s response to Fuller – sparked by an article written by Hart (taking a positivist view) and argued that law and morality are separate.

Students should be able to analyse these beliefs and views, debate and provide examples (see the suggestions in the Getting Started Guide).

Hint: Natural law is sometimes called the paternal view of laws.

Activity:

Write a brief statement saying whether the law on the situations below is valid from a natural law point of view and a legal positivist point of view.

1. Murder
2. Stealing an iPhone
3. Legalising prostitution
4. Giving a third off the full sentence for an early guilty plea
5. Passing a law for all football supporters to pay 10 per cent extra tax each year.
6. Death sentence for adultery
7. Allowing prisoners to vote

1.1.11 Theories of law – Utilitarianism

This theory is based on the belief that actions are right if they are beneficial to the majority. So, conduct must be right if it promotes happiness to the majority.

The relevant theorists for students to research here are:

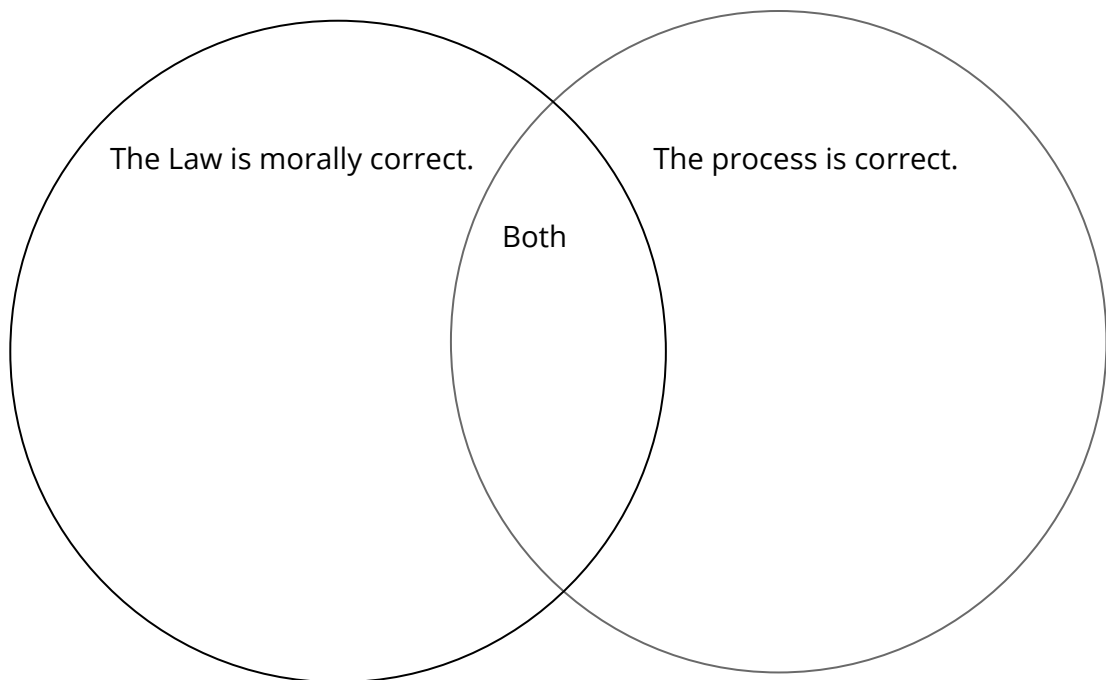
Jeremy Bentham (1748–1842)

An English philosopher, jurist, and social reformer who is thought of as the founder of modern utilitarianism. Bentham defined the main principle of his philosophy as that ‘it is the greatest happiness of the greatest number that is the measure of right and wrong.’

J S Mill (1806–1873) – an English philosopher, wrote ‘On Liberty’. He believed that it was important to control the use of coercion in society. He thought force should only be used in defence to protect others or oneself. As a utilitarian, he believed in self-restraint rather than intervention by others.

Students should be able to analyse these beliefs and views, debate and provide examples (see the suggestions in Getting Started Guide).

Natural law vs Legal positivism



Activity:

Position the following on the diagram:

1. abortion
2. adultery
3. people not vaccinated for Covid working as doctors
4. fox hunting
5. murder
6. lying
7. smoking on a train platform
8. animal testing for medical purposes
9. selling alcohol to a 17-year-old
10. parking on double yellow lines

The overlap is where natural law and legal positivism would agree on the validity of the law.

Sections 1.1.12-1.1.14 Law and morality

Sections 1.1.12-1.1.14 could be the content of short/part questions on Paper 1 or, indeed, be the content of the 20-mark Question 5.

The topic on Law and morality can be split into 3 parts:

- What is law and morality?
- What is the relationship between law and morality?
- Should law reflect moral values of society?

Morality:

- Meaning of this word is a custom, habit or usage that is determined by man's will rather than by laws.
- The state does not impose a penalty for breach, but a club or society may do so.
- Moral rules stem from upbringing, peer groups, religion or own conscience and are followed by own choice.
- Moral rules are enforced informally by ostracization by a group/society or club.

Law – see the definition on page 2.

Probably the best starting point for learning and discussions on Law and morality, their meanings, differences, similarities and examples, is to use group discussion to get students to think about difficult situations which have dilemmas that include both moral and legal issues.

Some examples are provided below to illustrate.

The overcrowded lifeboat

In 1842, a ship struck an iceberg, and more than 30 survivors were crowded into a lifeboat intended to hold 7. As a storm threatened, it became obvious that the lifeboat would have to be lightened if anyone were to survive. The captain reasoned that the right thing to do in this situation was to force some individuals to go over the side and drown. Such an action, he reasoned, was not unjust to those thrown overboard, for they would have drowned anyway. If he did nothing, however, he would be responsible for the deaths of those whom he could have saved. Some people opposed the captain's decision. They claimed that if nothing were done and everyone died as a result, no one would be responsible for these deaths. On the other hand, if the captain attempted to save some, he could do so only by killing others and their deaths would be his responsibility; this would be worse than doing nothing and letting all die. The captain rejected this reasoning. Since the only possibility for rescue required great efforts of rowing, the captain decided that the weakest would have to be sacrificed. In this situation it would be absurd, he thought, to decide by drawing lots who should be thrown overboard. As it turned out, after days of hard rowing, the survivors were rescued, and the captain was tried for his action. If you had been on the jury, how would you have decided?

The trolley problem

A trolley is running out of control down a track. In its path are five people who have been tied to the track by a mad philosopher. Fortunately, you could flip a switch, which will lead the trolley down a different track to safety. Unfortunately, there is a single person tied to that track. Should you flip the switch or do nothing?

More on the meaning of morality:

- morals are similar to laws – **Cicero** – Roman speaker who said laws and customs must be obeyed
- **Émile Durkheim** (sociologist) noted that law and morality can be the same when society have a lot in common, e.g. jobs, aims, religion
- however, Durkheim noticed that the more society became fragmented, the less law and morality achieved parity (known as anomie)
- factors for breakdown between law and morals: increasing specialisation of labour, ethnic diversity within society, and the fading influence of religious belief
- pluralist society: the UK is made up of numerous distinct ethnic, religious, or cultural groups which are tolerated by the majority of people
- a pluralist philosophy believes this is both desirable and beneficial to the well-being of most people.

Activity:

Give one example of the problem of laws not being in tune with societies' morals.

More on the meaning of law:

- **Legal positivism:** As long as laws are made by the recognized process, then they are valid, i.e. judicial precedent or parliament.
- **Natural law:** In order for laws to be valid, they must conform to a higher authority than man, e.g. have religious rigour.
- Natural law and legal positivism can reach the same conclusions on the validity of laws but can also come to differing outcomes.

What are the similarities and differences between law and morals?

Similarities:

- set standards of behaviour in society
- use similar language
- often overlap
- legal rules often rely on underlying morals to ensure they are easy to enforce.

Differences:

- morals are often not enshrined in law
- moral obligations sometimes ask the individual to do more than a legal one
- moral obligations are much harsher when omitting to do something.

Influences of law on morals and morals on law

Law on morals - examples include:

- race relations
- lowering the legal age of consent
- smoking in public places.

Morals on law - examples include:

- rape in marriage (illegal R v R)
- abortion
- hate crime laws
- anti- stalking and harassment laws
- forced marriage laws.

Does and should law reflect moral values?

- Natural lawyers argue that a law cannot be valid without being based on morality.
- **Mill** developed the 'harm principle', where law should only intervene where an individual's positive actions (not omissions) are likely to cause harm to others.
- In limited situations, omissions could be harmful, e.g. failing to give evidence in court.
- **Stephens LJ** disagreed with Mill - he argued that the law 'has a duty to proscribe behaviour condemned by society at large.'
- **Mill** argued that where the harm was only to the individuals themselves, this was their right, 'the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom'.

Hart-Devlin debate

1. Law Lord, **Patrick Devlin**, well known judge in the 20th century, believed that 'without shared ideas on politics, morals, and ethics, no society can exist' and felt laws should be based on society's morals.
2. **Professor Hart**, Oxford academic and legal philosopher, felt the opposite, namely that society should not interfere with private moral or immoral conduct.
3. **Hart** said law should only interfere with private matters where there is evidence that it creates a genuine public nuisance.
4. Wolfenden Report (1957) on homosexuality and prostitution recommended legalising homosexual acts between men aged 21 and over.

Activity:

What do you think Devlin's view was? Did Devlin believe homosexuality to be wrong?

What do you think Hart's view was? Did Hart believe homosexuality to be wrong?

Activity:

Hart-Devlin debate - applied to other areas of law

Would Hart or Devlin have approved of this?

1. **Shaw v DPP** (1962) – new offence created of 'conspiracy to corrupt public morals'
2. **R v Gibson** (1991) – an artist was convicted under the common law offence of outraging public decency for exhibiting earrings made from freeze-dried human foetuses
3. **Re A (conjoined twins)** (2001) – conjoined twins
4. **Re S** (1992) – enforced caesarean
5. **R v Quale & Others** (2005) – possession of cannabis to stop multiple sclerosis pain
6. **R v Brown & Others** (1984) – sado-masochistic sex prosecution
7. **R v Wilson** (1996) – tattooing on wife's buttocks
8. **Gillick v West Norfolk and Wisbech Health Authority** (1986) – allowing females under 16 year of age the right to confidential issuing of pill
9. **Pretty v United Kingdom 2346/02** (2002) – denying the right to allow assistance in suicide from terminal disease
10. **Blood case** – and more recent examples of using a dead partner's sperm to conceive
11. **Recent issues with Covid** – compulsory vaccinations, vaccine passports, risk of losing the job if one refuses vaccination, lockdowns and restriction of freedoms
12. **Transsexual identity issues** – recognition/ identification of a person's chosen sex and problems arising, e.g. a man identifying as a woman would be held in a woman's prison

Parliamentary debates over law making and morals

1. The *Human Fertilisation and Embryology Act 1990*
2. Mother, female partner babies
3. Saviour siblings
4. Hybrid embryos with three or more parents
5. *Civil Partnership Act and the Marriage (Same Sex Couples) Bill 2013* – rights of gay people to be married – but these marriages are not recognised/allowed in Roman Catholic or Church of England institutions
6. Rights of suspected terrorists to be detained without trial
7. *Abortion Act 1967*
8. Animal experimentation
9. Assisted suicide
10. *Equality Act 2006* – same-sex adoptive parents

Law and morality revision questions

Using online resources, such as [law teacher.net](http://lawteacher.net), and any other sources, complete the following tasks and then create a leaflet incorporating all the information.

1. Define law and morality.
2. Define what a natural lawyer is.
3. Define what a legal positivist is.
4. What was Thomas Aquinas' view on law and morality?
5. What was Lon Fuller's view on law and morality?
6. What is the command theory on law and morality?
7. Write a 100-word summary of what the Wolfenden committee report was about.
8. Write a short biography of Lord Devlin.
9. Write a short biography of Professor H. L. A. Hart.
10. According to Lord Devlin/Lord Denning, who is the man on the Clapham omnibus?
11. What was Lord Devlin's view on whether laws should reflect morality?
12. What was Professor Hart's view on whether law should reflect morality?
13. Apply Lord Devlin's theory to the legalisation of same-sex marriage.
14. Apply Professor Hart's theory to the legalisation of same sex marriage.
15. Apply Thomas Aquinas' theory to the legalisation of same-sex marriage.
16. Give a benefit and a risk to the creation of laws based solely on Lord Devlin's approach.
17. Give a benefit and a risk to the creation of laws based on Professor Hart's approach.

Law and morality – essay

Consider the view that there is a close relationship between law and morality.

Examine the debate as to whether the law should reflect moral values, and discuss issues which show the continuing importance of that debate.

Points to make:

1. Theories on how valid laws are made.
2. Process is important vs morals are more important.
3. How laws and morality interact.
4. Morals create laws, laws affect morals, examples connect to theories.
5. Benefits and problems, example cases, acts.
6. Hart-Devlin debate – how far should law reflect morals.
7. Hart & Devlin theory – link to the Wolfenden report.
8. Brown & Wilson and Hart v Devlin.
9. Apply Hart-Devlin to recent cases, acts, issues.
10. Benefits of each approach, e.g. assisted suicide, Re A (conjoined twins) (2001) 2 WLR 480.
11. Can Parliament & courts create laws and apply them without discussing moral issues today?
12. Example cases and situations – advantages and risks.
13. Conclude with how important it is that criminal and civil law reflects morals.

Outline essay plan

Part A – closeness of law and morality:

1. Define: law, natural law, Aquinas, Fuller vs legal positivists, Hart - primary & secondary rules.
2. Define: morality, Cicero, Durkheim.
3. Give examples of where law and morality converge: Salmond - interlocking circles.
4. Give examples of where law and morality diverge.
5. Give a detailed example of where morality changed law, rape and marriage, abortion.
6. Give a detailed example of where law changed morality, homosexuality.
7. Present a conclusion.

Part B - Should law reflect morals, and is it still an important debate?

1. Austin's theory of whether law should reflect morality
2. Hart/Devlin debate - Historical context, Wolfenden report
3. Devlin's theory in detail - example, Brown & others
4. Hart's theory in detail - example, Wilson & bigamy
5. Detailed discussion of 4/5 legal issues comparing Hart, Devlin, Austin - views on whether law should reflect morality

6. Parliamentary law-making and the Hart/Devlin debate – three-parent babies
7. **Must** show continuing importance of debate - through contemporary examples and human rights examples

Conclusion

Have the courts and Parliament got the balance right between freedoms of individuals and the moral rights that must be reflected in the law, for the public interest? What is the impact of pluralism in this process?

Draft for essay

Explain the question 'What are morals and how are they made?' – Aquinas vs Austin.

Now explain the question 'What are laws and how are they made?' – Lon Fuller v Hart.

These two paragraphs should be written to make comparisons and draw out the differences between law and morals – with examples of each. If this is not done, write an additional short paragraph to achieve this effect.

Briefly show the role of morality in law; illustrate with examples from crime, human rights, precedent and legislation.

The core of the essay – that some laws seek to express certain values which society considers moral (explicit moral values). These are based on philosophical views – authoritarian and paternal (natural) vs liberal (legal positivism) approach.

Start by setting out Mill's approach, Hart (liberal – don't get involved unless you have to).

Now explain the opposing view – Lon Fuller, Mills, Devlin (good laws must be based on society's moral compass).

What was the view of the role of law as set out in the Wolfenden Report?

Following on from this, you need to provide an explanation of the Hart/Devlin debate.

What was Hart's view of the role of the law?

What was Devlin's opposing view?

This debate is not just theoretical. Devlin's approach was expressed by the majority of the judges in the judgement of R v Brown 1994.

Explain Devlin's approach, Durkheim's comment, anomie.

Then there was the opposite (liberal) approach, supported by the decision in Wilson & bigamy.

Explain this liberal approach (pluralist approach – Hart).

You could then include some discussion showing the changing nature of morality through cases and areas such as:

- euthanasia with cases such as Dianne Pretty, forced marriages, freedoms under the *Human Rights Act 1998* – prisoners' right to vote, same sex marriage, wearing religious symbols at work
- 'genetic engineering issues' – such as IVF and cloning
- the willingness of judges in cases such as *Shaw v DPP* and in *R v Gibson* to uphold moral standards
- parliamentary issues of law and morals – abortion, animal experiments, detention without trial.

Your conclusion should address the title to reflect, answer or summarise the theme of the question.

Example question response

Consider the view that there is a close relationship between law and morality.

Examine the debate as to whether the law should reflect moral values and discuss issues which show the continuing importance of that debate.

(20 marks)

Morals are opinions or views that can be held differently depending on the person. They may vary from culture to culture and can be influenced from a number of people around you. For example, through someone's parents, friends, schools or through the media. Morals can be expressed in religious books such as 'do not have sex before marriage' however they act as just a guide, rather than set rules. As a moral view changes, the old moral can become outdated and new ones form, such as 'do not have sex before marriage' is not widely believed as a moral nowadays. Laws vary from morals and are a set of rules which are often written down in law books/journals open for judges and the public to interpret them. They can be made through European laws or by by-laws such as alcohol free zones, or not allowing dogs on a beach. They are set rules that everyone must follow and even if they become outdated, they will stay as a statute until there is reform.

Sometimes morals can reflect laws such as the moral in the bible 'thou shalt not kill' is also law in the law of murder. In criminal law, morals can be said to influence how a verdict is decided in the law. For example in the case of Kay Gilderdale, a mother helped her daughter with ME to die and was let off without a sentence which contrasts to the case of Francis Inglis where she injected her son with heroine and air to kill him and received the sentence of manslaughter. The difference between these cases in law suggests that the law should and does reflect moral values because the severity of the verdicts was based on moral issues. Francis Inglis therefore received a severe verdict because unlike Kay Gilderdale she has not just helped her child to fulfil their wishes, but she did it out of her own accord and so this was seen to be more immoral.

Laws are all rules of the state that govern our lives. There are two main views on whether laws created need to be morally valid. Legal Positivists believe that a law is valid as long as it follows the correct procedures when being created. The content of the law is irrelevant to making it morally valid. Austin said that, "a law which exists is a law, though we happen to dislike it." His command theory of law holds that the sovereign of the state has the right to create laws as long as they follow the correct process so in today's society any Bill that passes through the 10 stages in parliament and receive Royal Assent are valid laws regardless of their content. Some people may disagree with civil partnerships but legal positivists would say the law is valid as the Civil Partnerships Act has passed the correct parliamentary process and therefore morally valid.

Professor Hart felt Austin's approach was too simplistic and adopted a process of Primary rules which either impose legal obligations, as in criminal law, or they grant powers, as in the power to enter into a contract and Secondary rules, concerned with the operation of primary legal rules, e.g. the various readings of a bill in parliament. However, even Hart accepted that positivists would not always believe some laws to be valid due to their repugnant nature, for example the Nazi's use of

Acts of parliament to legitimise the persecution of the Jewish population.

In contrast natural lawyers believe it is not the process that makes a law valid but it's attunement with a higher level of moral thinking. For example, Aquinas believed that divine law should be the basis for all laws to be considered valid, with the obvious one of murder being clearly valid as it relates to the commandment thou shall not kill. Lon Fuller had a earth based approach to Natural law not necessarily believing that laws should be divinely valid but that validity came from a set of unwritten but general basic moral values across society. So Aquinas' natural law might view the Abortion Act as invalid as it could be said to sanction killing of unborn children whereas as the Act was not retrospective and is possible to obey therefore Fuller would view this as a valid law, it satisfies his eight principles of inner morality.

Law and morality can interact though Emile Durkheim, a sociologist, states that the more society becomes diverse (a pluralistic society) the more difficult this parity is to achieve, known as anomie. For example before the Second World War the UK was principally Christian in religion and therefore there was a close link between the laws on blasphemy and society's view of Jesus, notably in the case of Lemon and Gay news. However, it is increasingly difficult to argue laws on blasphemy are in keeping with our pluralistic society with more Muslims, for which the blasphemy laws offer no protection, as they are totally Christian based. So in the some areas of the law the link between law and morality isn't close.

Changing moral values can be reflected in the development of the law. For example Hale in 1736 stated a man cannot rape his wife as there was implied consent when married. In the 20th Century in the case of Clarke (1946) this law began to change so that where the wife was separated from her husband rape could be an offence. Finally in the case of R v R (1990) and echoing research on the issue of marital rape by the Law Commission, the HL abolished the immunity a husband had for raping his wife declaring that it no longer was relevant to the moral situation of society today, achieving a close link between law and morality.

Sometimes the law is introduced to change moral values. For example, the Race Relations Act 1965 was passed in order to counter overt discrimination in public places, such as signs on hotels saying 'no blacks'. But because morals in society were moving more slowly than the law there was fierce opposition to these changes and it wasn't until the Race Relations Act 1976 that specific powers to properly stop such discrimination was introduced.

Some people believe that the law should reflect moral values in tort law as well, this can be seen in the Hillsborough tragedy, where many people died as a result of being crushed in their football stands. Some people

who saw this tragedy take place were unable to have a successful claim, as they were secondary victims and could not satisfy the Alcock criteria. They could not satisfy this criteria because they did not have close ties of love and affection with the victims. Hence, this showed that the law does not always consider moral values, as many believed that the Alcock criteria was immoral and so should reflect moral values, so that people suffering from shock could claim even if they did not have close ties of love and affection. However, a counter argument to this was that the law should not reflect moral values as if this was allowed there would be too many claims going to court.

A philosopher, Mill came up with the 'harm principle' that the law does not have a responsibility to interfere with people's individual private lives as long as the individuals practice was not a matter of public annoyance/criminal. He believed therefore that homosexual acts between two consenting parties should be allowed.

This view was disagreed with by James Stephen who believed that the law should interfere with acts so wicked and gross such as homosexuality to protect society and its morals, and opposed Mills' libertarian approach and was of the view that the law should interfere with immoral acts, the paternalistic approach.

The Wolfenden Committee in 1957 produced a report to assess whether the law should reflect moral values and after a number of highly reputable men were found guilty of homosexual acts. The report agreed with Mills' views, that the law should not interfere with immoral acts between consenting individuals, such as homosexuality which should be made legal (in 1967, but the age of consent was not lowered until 2000, many years after heterosexual consent was enforced at 16) and that the law should be more concerned with criminal acts of public matter (such as soliciting in the street which is interfering and annoying to others as there is no consent), it also recommended that prostitution should also not be illegal as it was between two consenting adults and it was harming no-one.

Lord Devlin first agreed with the Wolfenden report, however, his views soon changed and he believed that laws should not allow immoral acts that would affect the social state and how it worked. In simple terms, he believed that laws should protect the shared morality of the state and so the law should reflect moral values. For example, Gunter Von Hagen's bodywork exhibitions where he displayed exhibitions of dead people, Lord Devlin would have viewed this as immoral and so Gunther should be criminalised for his acts as although people may be consenting to see the act they may not understand the true nature and therefore it is immoral and affecting the shared morality. However, nowadays, morals have changed so it may be seen that Gunther's exhibitions should be allowed to be legal (but here the law is still reflecting moral values). Hart disagreed with Devlin and believed that immorality does not have

any effect on the morality of the state and so should not be reflected in laws.

This debate is not just theoretical, in the majority view in the case of *R v Brown*, it was found that the sadomasochistic acts were immoral and so reflected the defendants being guilty, supported by the decision in *R v Emmett*, where consenting heterosexual couples doing immoral acts should also lead to immoral acts. This echoes Devlin's view that regardless of matters being private or not morality of society should be reflected particularly in criminal law, where its aim is to deter violent behaviour.

However, Mills' view can be supported in the minority of *R v Brown* where the view was that the law should not be concerned with immorality as such, but by whether the matter in hand was criminally wrong. In the case of *Wilson* the court appeared to adopt the view of Hart where matters that were of a private nature, a man tattooing his wife's buttock with his initial, was not regarded as a criminal offence even though Devlin may have argued that it was a matter for the criminal law to deter.

Devlin did admit that sometimes acts that might otherwise be called public and require his approach of applying conventional morality to them should actually be tolerated without legal interference. Hart as well recognised that acts that he would theoretically regard as private and not for legal interference should be acted upon to protect society as a whole. For example in *R v S* even though the right to refuse a medical treatment is a private matter Hart may well agree with the court's decision to enforce a caesarean in order to protect the unborn child. In *R v Gibson* Hart may also agree that an exhibition of free dried foetus was one which did cause a public nuisance and should be criminalised. Devlin may also agree that homosexuality is now a matter that is not out of step with conventional morality and accept it as a private matter in terms of civil partnership rights in the Civil Partnership Act.

The key issue with all theories on how far should law reflect morality is whether or not it is truly possible for the courts or parliament to gauge what is society's moral position at the time of making the law. For example in the case of *Gillick* legal positivists would find the HL ruling on contraceptive advice to under 16's acceptable as the case followed the rules of precedent whereas Aquinas would probably argue that denying a parent's rights to at least know of their child's sexual health was against one of the 10 commandments (respect thy mother and father). However, as the HL have no system with which to gauge public opinion it is debatable whether or not this was a decision that reflected morality of society. This is the same situation for the current cases such as *Diane Pretty* on the matter of assisted suicide.

Parliaments clearly have a strong mandate to gauge public opinion and on the basis of the legal positivist view of law and morality is that it is

underpinned by a clear democratic legislative process. So when the Human Fertilisation and Embryology Act 1990 was passed a large amount of consultation took place so clearly the moral timber of society could be gauged before the law was made. However, the Human and Embryology Act 2008 contains within it the ability to create saviour siblings, babies that can be born for the specific purpose of saving a living child through tissue donation. The key question is have these issues been truly considered in terms of societies overall moral standing or is technology moving at such a pace that the law is sidelining debates such as the Hart Devlin discussion for the sake of scientific exploration.

Therefore, in conclusion, some views (the libertarian view) disagrees that the law should reflect moral values and is not relevant to society as a whole (Mill, Hart and the fact that Alcock's primary victims were unable to claim) however there is also a strong view that it is unfair and does not protect the state and community if laws do not reflect moral values, such as homosexuality supported by James Stephen, Lord Devlin and the victims at Hillsborough and the verdicts in the cases of Gilderdale and Inglis. There is definitely evidence that the law does reflect moral values such as thou shall not kill and whilst most agree that the best laws have a clear moral underpinning but in contentious areas of the law this is extremely difficult to achieve in a pluralistic society, such as the current debate on gay people being allowed to become "married".

Commentary on the response

There is discussion of the relationship between law and morality in this response, though this could show more development of the concepts. There could be more relevant recent examples which highlight the 'continuing importance'/current topicality of the debate, e.g. issues relating to conception, death, etc. The response is a little long and the student would really need to make their answer more concise in a time-constrained examination.

No specific marks are allocated to spelling, punctuation and grammar. For more details on the marking criteria, please see mark schemes in the sample assessment materials.

Overall, an excellent response achieving a high Level 4 mark.

Further essay titles

Do the rules that govern our lives work best when they reflect society's customs and beliefs?

(20 marks)

Analyse the relationship between law and morals.

(20 marks)

Using decided cases evaluate whether the concept of morality is certain and therefore enforceable.

(20 marks)

Sample essay

Analyse the relationship between law and morals.

(20 marks)

There have been many different views expressed by theorists regarding the relationship between law and morals, and these views have influenced many legal reforms. It is useful to begin with an explanation of the characteristics of, and distinctions between, legal and moral rules, before proceeding to explore areas of coincidence and areas of divergence.

Law was described by Sir John Salmond as ‘the body of principles recognised and applied by the state in the administration of justice’. Breach of legal rules will result in state sanctions and procedures. In criminal law there are sanctions such as imprisonment. In civil law the wrongdoer is usually ordered to compensate the victim. Other characteristics of legal rules are that they take effect at a precise time and require compulsory compliance by all members of society. An example is the Offences Against the Person Act, which has applied to everyone since 1861.

Society’s code of morality is defined by Phil Harris as a set of beliefs, values, principles and standards of behaviour. Unlike legal rules, compliance with moral rules is voluntary and enforcement is informal, usually through social or domestic pressure. Moral rules develop usually over long periods of time, as conduct becomes increasingly acceptable or unacceptable. In a pluralistic society, however, such as that in the UK, the moral duties of individuals vary. For example, while some individuals regard abortion or homosexuality as immoral, others do not.

The relationship between legal and moral rules can be described as two intersecting circles. The intersection represents the coincidence of law and morals, and the areas outside the intersection represent areas of divergence.

Long-established rules, for example those prohibiting murder or theft, can be traced back to a moral source, this being the Ten

Commandments. However, there are many ways in which legal and moral rules may come to coincide.

Judicial reform of the law may be influenced by public morality. In the criminal law, the House of Lords decision in *R v R* (1991) was influenced by the moral rule that a husband should not force his wife to have sexual intercourse. In contract law, the equitable remedy of promissory estoppel, developed by Lord Denning in *Central London Property v High Trees House* (1965), was influenced by the moral rule that promises should not be broken.

Legislative reform may be also be influenced by public morality. Legislative reforms of the 1960s could be said to reflect the moral ideals of that decade. As public morality has shifted toward a greater acceptance of homosexuality, the legislature has responded. The Sexual Offences Act 1967 legalised homosexuality between consenting males over the age of 21. In 1994 the age was reduced to 18 and in December 2000 it was reduced to 16.

In turn, it can be argued that legislation is sometimes introduced with the aim of educating the public to consider certain behaviour morally wrong. An example is the discrimination legislation, which aims to educate the public not to discriminate on the basis of sex, age or disability.

While there is a considerable overlap of legal and moral rules, the pluralistic nature of society means that the coincidence is partial. Britain has a population of mixed cultures and races, of mixed political ideals and of differing religious followings. It can perhaps be argued that there is no public consensus on any moral issue. Cases in which the judiciary has had to consider differing moral positions include *Gillick v West Norfolk and Wisbech Health Authority* (1986), *Re A (Children)* (2000) and *ex parte Dianne Pretty* (2001).

Statements reflecting the pluralistic nature of society can be in the Hart-Devlin debate. The Sexual Offences Act 1967 was introduced following recommendations made by the Wolfenden Committee in its 1957 report. The report prompted the debate. Professor Hart drew on the work of Professor John Stuart Mill who, in his essay 'On liberty', stated: '...the only part of the conduct of anyone, for which he is amenable to society, is that which concern others...over himself, over his own body and mind, the individual is sovereign.' Hart and Mill believed it was immoral to make the minority conform to the will of the majority when in private. They recognised the pluralistic nature of society and the importance of individual liberty. Lord Devlin's views are more reflective of the late nineteenth-century criminal judge Sir James Stephen. Devlin believed that the loosening of moral bonds would lead to the disintegration of society. The law should punish acts which offend the common morality, whether done in public or in private.

Sir John Wolfenden followed the views of Mill and Hart. Their views were reflected in other reforming legislation of that decade including the Obscene Publications Act 1968 and the Divorce Law Reform Act 1969. The majority of the House of Lords in *Gillick v West Norfolk and Wisbech Health Authority* (1986) also adopted the Mill and Hart approach.

However, the influence of Stephen and Devlin can be seen in a number of judicial decisions. Perhaps the most significant recent decision is that of the House of Lords in *R v Brown & Others* (1993) and the European Court of Human Rights in *Laskey, Brown & Jaggard v United Kingdom* (1997). The House of Lords held that the defence of consent could not be used in respect of sadomasochistic acts, which in this case were conducted in private. The European Court of Human Rights upheld the decision. Infringement of Article 8, the right to respect for private life, was justified by the need to protect health and morals.

The broad overlap of legal and moral rules is perhaps due to the characteristics they share. Both are concerned to impose certain standards of conduct without which it is difficult for society to exist, and both employ normative language. Laws, as Harris states, 'are found side by side with moral codes of greater or less complexity'.

There are, however, areas of divergence. There appears to be little moral justification for tobacco and alcohol consumption being legal and smoking of cannabis illegal. Similar arguments are raised by the legal requirement for pubs to close at 11 p.m. There are also moral rules which are not reinforced by legal rules. An example is the moral duty to help people who are in danger. The general position (there are exceptions) is that there is no legal liability for failing to act.

Natural law theorists would argue that legal rules which have no moral connection should not be afforded the status of law. According to Lloyd, the common thread running through the different views expressed as to what natural law is, is 'the constant assertion that there are objective moral principles which depend upon the nature of the universe'. Aristotle believed that the laws of nature constituted the natural law. St. Thomas Aquinas believed that natural law was the divine law. In the mid-twentieth century, Professor Lon Fuller referred to the inner morality of law. To be valid the law had to conform to certain procedural requirements including consistency and being prospective.

In contrast, the positivists believe that whether a law is good or bad it is still valid. The origins of John Austin's command theory, whereby law is a command from a sovereign and enforced by a sanction, can be traced to Jeremy Bentham and Hobbes. Jeremy Bentham rejected natural law theories as 'nonsense on stilts'. Natural law was based on unprovable principles. What the law is, and what the law ought to be, should be treated as different issues.

Professor Hart also subscribes to the positivist view. From 1958 to 1967, a debate took place between Hart and Fuller. This was sparked by the views of the German philosopher Gustav Radbruch. According to Radbruch and Fuller, the Nazi laws which permitted atrocities should not have been regarded as valid. This was the view later adopted by the German courts. Hart, however, considered that the laws were legally valid but should have been challenged by people prepared to take the legal consequences.

In conclusion, it can be seen that there is a close relationship between legal and moral rules. A substantial body of English law is based on moral rules. The extent to which law should be influenced by morality remains topical. While it can be argued that significant section of society has come to adopt the view taken by Professor Hart, there nevertheless remains a widely shared belief that the weakening of the moral basis of law is dangerous.

Commentary on the response

This is a very good answer, which approaches the question in a sophisticated way. It is well-structured, comprehensive and concisely written. There is good use made of material drawn from many areas of the specification. The theories of the relationship between law and morality are soundly explained and illustrative material is used to demonstrate the influence of the theories on the development of the law. It would be awarded marks in Level 4.

No specific marks are allocated to spelling, punctuation and grammar. For more details on the marking criteria, please see mark schemes in the sample assessment materials.

Sample essay

Using decided cases evaluate whether the concept of morality is certain and therefore enforceable.

(20 marks)

Morality is a form of social control that is based on social values, beliefs and traditional ideology. It is often debated whether morality should coincide with law. Law refers to the set of legal rules which dictate an individual's behaviour in society and is made by a supreme body such as parliament. Law can be considered to be certain instead of morality since a law either exists or does not exist, whereas morality evolves as a feeling in society. A law can be changed and repealed whereas morality

takes time to change. The breach of a law gives rise to criminal sanction whereas the breach of a moral rule will not have any legal consequences but may give rise to social condemnation. Morality is based on individual preference and values and this is not usually reflected in legislation. Thus, it can be questioned if morality is enforceable or not. Whether law and morality should coincide was hotly debated in the 1950s when it was considered a time of decline in sexual morality. The then government sent out a committee to see if the laws on homosexuality and prostitution needed changing. The findings of the committee known as the Wolfenden report stated that laws on the two areas should be changed and the activities legalised with certain restrictions. This was based on the belief that certain morality should be left to individuals rather than controlled by the state. The government should not interfere with the private morality of people and what they choose to practice according to individual choice. Leading judge Devlin opposed the findings of the committee and Professor Hart approved.

This initiated the famous Hart-Devlin debate. Approving the report concedes the idea that individuals should be left to make their own choices as long as they do not harm others. Devlin debated that some form of morality was needed to keep society together based on basic ideas of good and evil. The overall reaction to the Hart-Devlin debate was mixed. Devlin's view of having enforceable powers and being certain for the betterment of society was supported in *Shaw v DPP* where Mr. Shaw was held liable for conspiring to corrupt public morals when he published the Ladies Directory advertising pictures of prostitutes and the sexual practices they offered. Similarly, strength of moral views was enforced in *Kneller v DPP* where the defendant was held for the same crime as Mr. Shaw when he advertised in the magazine *International Times* inviting men to engage in homosexual activity with other men. In *R v Gibson* the common law offence of not upholding public decency was held where an artist used freeze dried foetuses for one of her projects. Lastly in *R v Brown* the appellants were adult consenting men who engaged in sadomasochistic activity including instruments such as stinging nettles, sand paper, safety pins to derive sexual pleasure. The court held that even though the injuries that occurred were transient and minor the men would still be liable for criminal injury.

In these cases it can be said that morality was certain and thereby enforceable so all the defendants were held liable however in certain cases strength of morality seemed to diminish as courts took a more practical approach based on legal ideology. In *Gillick v West Norfolk and Wisbech Area Health Authority* Mrs Gillick a conservative, Christian woman was against the medical advice on contraceptives and treatment given to girls under 16 without parent consent because she believed it would encourage underage sex. Her claim was rejected. In *Re A(Children)* the court of appeal held that it was a court of law, not a court of morals where doctors were given permission to separate a pair of twins who were conjoined, as one was depriving the other healthier one of oxygen. Therefore, even though morality would say that killing one to save

another is unjustified the court gave priority to law and morals were kept aside. As such it can be said that in certain cases morality is unenforceable

Murder and theft are both morally accepted as wrong behaviour and are also subject to strict legal sanctions. So here it can be said that morality is enforceable through law. Morality can be called uncertain as proved by the case of *R v R* where after 200 years rape within marriage was declared an offence. Previously women were held inferior to men and it was deemed that on marriage she had given irrevocable consent to sex with her husband. However, morality has changed, women's equality has improved and the law has changed to keep pace with morality. The Abortion Act and same-sex marriages are also examples of this. Society and law has become more accepting of people's individuality and freedom to make their own choices.

Natural Law theorist Aquinas believed that law came from a higher God and law that did not coincide with morality was not to be considered law at all. However, over time as science advanced utilitarianism became more popular and people seemed to give such importance to morality. J S Mill stated that as long as people do not harm others they can be left to what they deem right

Other subjects where the certainty of morality and the extent of its enforceability is compromised include surrogacy, euthanasia, death penalty and viewing pornography.

The Race Relations Act is an example of law trying to bring about a change in people's morality. It attempts to prevent intolerance.

However, if questioned, some people's morality is so certain that even a law cannot change it.

In conclusion over time people's moral views have changed so as these are always changing, morality cannot be certain, except in areas like murder and theft where they are. Many people cannot be controlled by morality as they make their own choices, so it can be said that morality remains unenforceable as it is based on individual choices and will differ from person to person.

Commentary on the response

This is a good attempt at tackling the question. It offers examples, shows a reasonable understanding and strives to provide analysis and conclusion. It would be marked in the bottom of Level 4.

No specific marks are allocated to spelling, punctuation and grammar. For more details on the marking criteria, please see mark schemes in the sample assessment materials.

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